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Supreme Court, U.S.
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No. 01-0009

In the Supreme Court

OF THE

United States

LAFFIT PINCAY, JR. AND CHRISTOPHER J. MCCARRON,
Petitioners,

VS.

VINCENT S. ANDREWS, ROBERT ANDREWS, AND
VINCENT ANDREWS MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
Counsel on the Reply Brief
Iverson, Yoakum, Papiano & Hatch
624 South Grand Avenue
27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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ARGUMENT

I.

PETITION'S QUESTION RAISED IN COURT OF APPEALS

Petitioners' petition for rehearing and rehearing en banc, argued, for example, that "the panel apparently believes the issue of constructive knowledge is simple: the panel need only (1) note that Pincay and McCarron received a document before 1985, and (2) determine that the document contradicted the appellants' oral agreement to manage Pincay's and McCarron's financial affairs for a flat fee of 5% of Pincay's and McCarron's respective annual incomes."[1] In other words, the panel fashioned a "per se rule of imputation upon receipt."[2] Petitioners asked the court to reconsider its "per se rule of imputation upon receipt" because the rule caused the court to make a decision that conflicts with decisions of other courts in the Ninth Circuit.[3] Further, petitioners' answering brief argued that since the parties disputed the underlying facts, the issue of inquiry notice was not a question of law, and that substantial evidence supported the jury's conclusion that petitioners were not on inquiry notice before 1985. In sum, petitioners gave the court of appeals an opportunity to address petitioners' arguments and the question of whether the jury's rejection of the fiduciaries' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

True, the Seventh Circuit and Eighth Circuit cases cited in the petition were not presented to the court of appeals. But that does not diminish the importance of the conflict resulting from the court's decision, or cause this case to be

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[1] Appendix B p. 4.

[2] Appendix B pp. 3, 7 n. 20.

[3] See, e.g., Appendix B p. 1.

unworthy of Supreme Court review. Indeed, the Seventh Circuit and Eighth Circuit cases support the decisions of the other courts of the Ninth Circuit that conflict with the court of appeals' decision. Moreover, as the Seventh Circuit and Eighth Circuit cases confirm, the conflict pointed out in the petitions for rehearing is direct, real, has a broad impact, and will have continuing future consequences.

Respondents recognize that apart from the actual litigants here, the Court's resolution of the conflict created by the court of appeals' decision will affect persons who are in fiduciary relationships, or future RICO litigation arising out of such relationships.[4] On one side, the court of appeals' "per se rule of imputation upon receipt" or "bare access accrual" rule negates the reality that a fiduciary relationship often lulls the beneficiary into a sense of trust or security, and, thus, the fiduciary's documents received and signed by the beneficiary may not excite the beneficiary's suspicion.[5] On the other side, paraphrasing respondents, a statute of limitations exists, obviously, to prevent beneficiaries from asserting rights against fiduciaries after the lapse of time. Accordingly, when fiduciaries try to forecast their contingent liabilities in those cases, they will depend on whether federal law conclusively presumes knowledge of the contents of

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[4]BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI (hereafter "BRIEF") p. 9 ("One of the principal reasons for a statute of limitations, and for the parol evidence rule, is to preclude a party who has had the benefit of the bargain for a long time from turning around and crying fraud...."); Brief p. 1-2 ("no bare access accrual" rule would allow long and well-documented courses of dealings to be thrown into question retroactively); and Brief p. 13.

[5]Cf., e.g, *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 459-61 (9th Cir. 1986), and earlier at 739 F.2d 1434, 1436-37 (9th Cir. 1984); *Hilton v. Mumaw*, 522 F.2d 588, 595-97 (9th Cir. 1975); *Luksch v. Latham*, 675 F.Supp. 1198, 1202-03 (N.D.Cal. 1987). Note: These cases were cited, among other cases, in the petition for rehearing. See e.g., Appendix B p.5.

documents provided by the fiduciaries, or whether federal law considers other evidence. Moreover, by fashioning, in effect, a conclusive presumption, the court of appeals avoided the well-settled obligations to (1) draw all reasonable inferences in favor of petitioners, (2) not to make credibility determinations, and (3) not to weigh the evidence differently from the jury.[6]

To be sure, well-settled common law presumes that a person who signs a contract knows it contents. Yet, that principle does not apply when, as proven here, the other contracting party engaged in fraud, misrepresentation, or other wrongful acts.[7] Moreover, it is well settled that a beneficiary in a confidential relationship is justified in assuming that his or her fiduciary will not act inconsistent with the beneficiary's welfare and may justifiably rely on the fiduciaries' representations.[8]

The Seventh Circuit and Eighth Circuit both require undisputed evidence that (1) a suspicious circumstance occurred, (2) the suspicious circumstance was sufficient to prompt accessing the information, and (3) the plaintiff was aware of that suspicious circumstance.[9] Both circuits would

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[6]See, e.g., *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149-151 (2000); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999), cert. denied 528 U.S. 1061 (1999).

[7]See, generally, Am Jur 2d CONTRACTS § 224 (2000).

[8]See, generally, 17A Am Jur 2d CONTRACTS § 237 (2000); 37 Am Jur 2d FRAUD AND DECEIT § 254 (2000). Cf. *Maiz v. Virani*, 253 F.3d 641, 675 (11 Cir. 2001).

[9]See, e.g., *Fujisawa Pharmaceutical Co. Ltd. v. Kapoor*, 115 F.3d 1332, 1335-36 (7th Cir. 1997); *McCool v. Strata Oil*, 972 F.2d 1452, 1456 (7th Cir. 1992); *Ritchey v. Horner*, 244 F.3d 635, 638-641 (8th Cir. 2001); *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.*, 120 F.3d 893, 897 (8th Cir. 1997) ("We assume the facts of Tracey's knowledge as he alleges them."); *Davidson v. Wilson*, 973 F.2d 1391, 1393, 1400 (8th Cir. 1992).

agree with the district court here that respondents are not entitled to a judgment as a matter of law on the statute of limitations defense. Moreover, they would affirm the jury's decision that before 1985 the petitioners did not know enough facts to trigger their duty to inquire.

Respondents argue that petitioners are asking this Court to adopt a new rule of law that relieves victims of the "obligation to show they were reasonably diligent."[10] Respondents' argument is without merit. Indeed, the petition is asking the Court to resolve a circuit split regarding the fundamental and important issue regarding what *triggers* the victim's duty to inquire. Stated another way, the conflict pertains to the question of when the RICO statute of limitations begins to run, which this Court acknowledges is a question that divides the courts of appeals.[11] The petition gives the Court an appropriate opportunity to settle the question.

II.

PREVIOUS OPINIONS OF THE SUPREME COURT HAVE NOT CONSIDERED PETITIONERS' CONTENTIONS

Respondents argue that *Rotella v. Wood*[12] and *Klehr v. A.O Smith Corp.*[13] are dispositive of petitioners RICO

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[10] Brief p. 12.

[11] *See, e.g., Rotella v. Wood,* 528 U.S. 549, 553 (2000) ("Although we chose a uniform 4-year period on a Clayton Act analogy . . . we did not decide when the period began to run, and the question has divided the Courts of Appeals."). Also *id. at 554 n.2* ("We do not, however, settle upon a final rule . . . . ").

[12] *Ibid.*

[13] 521 U.S. 179 (1997).

claims here.[14] Neither case, however, established a "per se rule of imputation upon receipt" nor a "bare access accrual" rule. Moreover, petitioners are not asserting either the "injury and pattern discovery" rule, rejected by *Rotella*[15], or the "last predicate act" rule, rejected by *Klehr.*[16] Finally, this case is factually different from *Rotella* and *Klehr.*[17]

From another angle, the court of appeals' per se rule looks like a variation of the Clayton Act's "straight injury occurrence" rule, under which "discovery would be irrelevant."[18] The Clayton Act accrual rule, however, has its limits in civil RICO cases, which, "unlike typical antitrust cases, involve fraud claims."[19] Some might argue that for purposes of civil RICO cases the Court could soften the Clayton Act "injury occurrence" rule with tolling principles. The question this

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[14] Brief p. 7-8.

[15] *Rotella, supra.,* 528 U.S. at 554.

[16] *Klehr, supra.,* 521 U.S. at 188.

[17] In *Rotella,* a fiduciary relationship did not exist between the plaintiff and the defendant psychiatric hospital when the plaintiff learned that the defendant had pled guilty to criminal fraud charges three years before plaintiff filed suit. *Rotella, supra.,* 528 U.S. at 559. (The fiduciary relationship ended when the defendant discharged the plaintiff eleven years before he filed suit. *Id.* at 551.) Moreover, plaintiff did not deny he knew of his injury when it occurred eleven years before he sued the defendant. *Id.* at 558-59.

In *Klehr,* the parties did not have a fiduciary relationship. Indeed, the plaintiffs were dairy farmers, and the defendant was a store selling silos to the public. *Klehr, supra.,* 521 U.S. at 183-84 Moreover, the plaintiffs did not deny that knew they were injured when they purchased silos from the defendant. *Ibid.*

[18] *Rotella, supra.,* 528 U.S. at 554, n.2.

[19] *Klehr, supra.,* 521 U.S. at 191.

petition presents, however, pertains to inquiry notice, not tolling principles.[20]

III.

THE RECORD SUPPORTS THE PETITION

Contrary to respondents' brief, this RICO case is based on respondents' mail and wire fraud.[21] Moreover, the record shows petitioners testified that the 5% of annual income fee included investments, and that petitioners and respondents contemplated and agreed that compensation from the investments would not be in addition too, or on top of the 5% of annual income.[22] In sum, the record shows that the district court and the jury have it right here: the RICO claims are not time-barred.[23]

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[20] Respondents argue that the "no bare access accrual rule" would make "tolling automatic and virtually irrefutable, regardless of the disclosures." Brief p. 14. Respondents do not understand, apparently, that the issue of what facts trigger the duty to inquire (or start the clock running) is analytically distinct from the issue of what facts toll the running after the clock starts. Indeed, the Seventh Circuit and Eighth Circuit's cases plainly state that the rule precludes "bare access" from automatically *triggering* the duty to inquire (see, e.g., *Fujisawa, supra.*, 115 F.3d at 1335 ["But more than bare access to necessary information is required to start the statute of limitations running. There must also be a suspicious circumstance to trigger a duty to exploit the access; an open door is not by itself a reason to enter a room."]; see also *Great Rivers, supra.*, 120 F.3d at 897). *Ibid.*

[21] Indeed, after listening and watching the witnesses testify and considering all the evidence presented at trial, the district court agreed with the jury that petitioners had proven that they were victims of respondents' scheme of mail and wire fraud, and therefore entitled to judgment under RICO. Appendix A-11, A-12, A-13.

[22] Appendix C. pp. 27-30; 162-164.

[23] See, e.g., Appendix C and D.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted

IVERSON, YOAKUM, PAPIANO & HATCH
NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
Counsel on the Petition
624 South Grand, 27th Floor
Los Angeles, CA 90017
(213) 624-7444
Counsel for Petitioners

Date: August 13, 2001

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
	)	GRANTING
	)	PLAINTIFF'S
	)	MOTION
Defendants.	)	FOR
	)	RECONSIDERATION
	)	
CHRISTOPHER J. MCCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

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Central District of California
By Deputy

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Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron").

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. After the bankruptcy stays were lifted, the Court granted VAMC judgment as a matter of law on plaintiffs' RICO claim and denied defendants' motion in all other respects.

Plaintiffs now move for reconsideration of that decision. The parties have briefed other post-trial issues, including whether the individual defendants are entitled to a new trial or judgment as a matter of law in light of the judgment for VAMC and whether plaintiffs' election of RICO remedies should be considered binding.

II.

MOTION FOR RECONSIDERATION

A. *Legal Standard*

Reconsideration is generally a matter for the discretion of the Court, *Fuller v. M.G. Jewelry,* 950 F.2d 1437, 1441 (9th

Cir. 1991). It is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *School District No. 10, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A court may reconsider an interlocutory order at any time. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F.Supp. 1349, 1353 (N.D. Cal. 1995) ("Reconsideration is justified if . . . there is a need to correct clear error or to prevent manifest injustice.").

In this case, plaintiffs argue that the Court's decision to grant judgment as a matter of law to VAMC was clearly erroneous. Because no final judgment has been issued for VAMC, the Court's decision was an interlocutory one. *See id.*

B. *Discussion*

Robert Andrews, Vincent Andrews, and VAMC are liable under the RICO statute if they were associated with "any enterprise" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). In the Pre-Trial Conference Order, plaintiffs identified VAMC as the only RICO enterprise involved in the case. The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a § 1962(c) RICO claim; the "enterprise" itself cannot also be a person who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984). The Court has ruled that "VAMC cannot, as a matter of law, be liable as a 'person' under § 1962(c) . . VAMC is entitled to judgment as a matter of law on plaintiff's RICO claim." (June 29, 1996, Order at 5.)

Plaintiffs do not dispute that VAMC could not be a RICO enterprise and a defendant in the case. However, they argue that judgment should be reinstated against VAMC based upon another RICO enterprise theory. Plaintiffs now contend that they presented evidence to the jury of a RICO enterprise composed of an association-in-fact of VAMC, Vincent Andrews, and Robert Andrews. Plaintiffs argue that the jury instructions and verdict indicate that the jury was presented with and persuaded by this association-in-fact theory.

Where "[f]acts supporting the court's findings and conclusions were before the court and were argued . . . [a] court properly may consider the pleadings and pretrial order to have been amended to conform to the evidence presented." *Sauers v. Alaska Barge* 600 F.2d 238, 244 (9th Cir. 1979). However, in its June 29 Order, the Court concluded that

> [p]laintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

(June 29, 1996, Order at 7-8.).

Plaintiffs have identified new support for their argument. They contend that the jury instructions given by the Court indicate that they presented the association-in-fact theory to the jury. They have also identified portions of the closing arguments discussing their RICO claim in support of their contention. The jury was instructed that

> Plaintiffs contend that defendant Vincent Andrews Management Corporation was both a person liable under RICO and an enterprise which affect interstate or foreign commerce, and that defendants Robert Andrews and Vincent Andrews participated in this enter-

> prise through a pattern of racketeering activity. *Plaintiffs also claim that all three defendants were associated-in-fact as an enterprise that affected interstate or foreign commerce, and that all three defendants participated in this enterprise through a pattern of related activity.* Defendants deny these contentions.

(emphasis added).

The court has an obligation to read the verdict harmoniously with the jury instructions given. *Interstate Markings, Inc., v. Mingus Constructors, Inc.*, 941 F.2d 1010, 1013 (9th Cir. 1991). It must draw all possible inferences in favor of the jury's verdict and findings, *Donoghue v. Orange County*, 848 F.2d 926, 932 (9th Cir. 1988) (motion for directed verdict).

C. *Elements of Plaintiffs' RICO Claim*

To establish a RICO claim, plaintiffs were obligated to prove "1) that the defendant[s], 2) through the commission of two or more acts, 3) constituting a 'pattern,' 4) of 'racketeering activity,' 5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in, 6) an 'enterprise,' 7) the activities of which affect[ed] interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983).

1. *Predicate Acts*

Plaintiffs argue that the predicate acts committed here were the investment recommendations made to them by defendants without disclosure of defendants' partnership interests. They contend that more than two of these recommendations were made in violation of the mail and wire fraud statutes.

2. *Pattern*

Plaintiffs had to establish that the acts constituted a "pattern," which has been interpreted by the Ninth Circuit

to create a test whether the acts of the defendants were related and posed a threat of continuing activity. *Ikuno v. Yip,* 912 F.2d 306, 309 (9th Cir. 1990); *Sun Sav. & Loan Ass'n v. Dierdorf,* 825 F.2d 187, 192 (9th Cir. 1987).

The evidence showed that defendants had a financial relationship with both plaintiffs that lasted for two decades. That relationship extended to a number of ventures in which defendants had financial interests at the time they recommended them to plaintiffs.[1] Plaintiffs presented evidence at trial that defendants failed to adequately disclose those interests to them. These recommendations were made in a similar fashion and continued over the course of a number of years.

Plaintiffs presented their pattern argument to the jury. In their closing argument, plaintiffs contended

> there has to be a pattern. Here we have a pattern in Laffit's case of over 18 years, a pattern I would submit to you is very clear. It was here. There was knowingly an attempt to deceive.

(Transcript, July 29, 1992, at 32.). Plaintiffs satisfied the pattern element of their claim.

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[1]For example, the Pre-Trial Conference Order states that VAMC was compensated for performing accounting services and had a wholly-owned subsidiary serve as a general partner for one of the partnerships in which plaintiffs invested. (Pre-Trial Conference Order, at 16-17, 23.) Robert Andrews and companies owned by him received fees from or participated in various limited partnerships. (Pre-Trial Conference Order, at 5, 9-11, 14-15. 20-24, 26-32, and 34-37.) Vincent Andrews also made money in various partnerships with the plaintiffs as a limited partner, a general partner, and a president or stockholder of corporate general partners. (Pre-Trial Conference Order, at 4, 9, 11-12, 14, 17-21, 25, and 33-34.).

3. *Racketeering Activity*

For RICO purposes, the term "racketeering activity" incudes a broad assortment of federal crimes, including the acts of mail and wire fraud alleged here. 18 U.S.C. § 1961(1)(B).

The mail and wire fraud statutes provide that anyone who devises "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and uses the mail or wires to do so shall be fined not more than $1,000 or imprisoned for not more than five years, or both. 18 U.S.C. §§ 1341, 1343. Plaintiffs presented evidence to the jury that defendants presented investment opportunities to plaintiffs over the telephone and through the mails without disclosing their financial interests in those investments. The jury could have concluded that this evidence met the requirements set forth in the mail and wire fraud statutes.

To the extent that plaintiffs established that defendants committed mail and wire fraud, they have satisfied the racketeering element of the claim.

4. *Enterprise*

RICO defines "enterprise to "includ[e] . . . any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To establish the existence of an association-in-fact enterprise, plaintiffs had to establish that the members of the enterprise "share[d] a common purpose of engaging in a course of conduct" and produce "evidence of an ongoing organization, formal or informal, and . . . that the various associates function[ed] as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583 (1981). Plaintiffs presented their association-in-fact argument to the jury, albeit confusingly, in their closing argu-

ment. With regard to "evidence of an ongoing organization," plaintiffs argued that

> [t]he people have to be employed by or in association with the enterprise. Well, there is no doubt about that, VAMC's relationship with Robert and with Vinny and the association with the conspiracy.

(Transcript, July 29, 1992, at 32.). Though plaintiffs initially observed that the association was somehow separate from the enterprise, by analyzing the agreement with the three defendants as a "relationship" and an "association" plaintiffs presented evidence of an association-in-fact to the jury in accordance with the jury instructions.

Plaintiffs also argued that

> VAMC was the vehicle that was used for all of these transactions. That is, they acted independently as a group. That sounds like it is a contradiction, but VAMC acted through Vinny, through Robert, and they acted themselves.

(Transcript, July 29, 1992, at 35.).[2] Here, plaintiffs described each of the three defendants as independent actors operating with one another. Each defendant "acted independently," but as a whole, they operated "as a group." Plaintiff's closing argument identified their association-in-fact claim of an ongoing, informal enterprise comprised of VAMC and its officers for the jury.

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[2]Enterprises composed of a corporation and its officers are not without precedent in the Ninth Circuit. The circuit has held that individual officers of a corporation can form an association-in-fact with the corporation. *U.S. v. Feldman,* 853 F.2d 648, 655-56 (9th Cir. 1988). Nor must the corporation be devoted entirely to illegal ends to do so. A corporate member of an association-in-fact "may be entirely legitimate and need not benefit from the racketeering." *Id.* at 657.

Plaintiffs also had to also show that the enterprise existed "separate and apart from the pattern of activity in which it engages" to prove their association-in-fact claim. *Turkette,* 452 U.S. at 583. To establish separate existence,

> it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering .... The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996). The Ninth Circuit has held that an association-in-fact of corporate entities and their officers has an ascertainable structure separate from racketeering. *United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988) (because corporation has a legal existence separate from its participation in racketeering, "the very existence of a corporation meets the requirement for a separate structure").[3]

Plaintiffs' closing argument referred to the separate existence of the enterprise and its activities other than those involving plaintiffs.

> Obviously, they talked with each other, *with other persons,* with themselves, with the plaintiffs, and there has to be a pattern.

(Transcript, July 29, 1992, at 32.) (emphasis added). Plaintiffs presented evidence to the jury from which it could

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[3]Plaintiffs observe that the Pre-Trial Conference Order established that the individuals involved in the conspiracy carried out functions in its furtherance separate from their corporate functions. That order stated that "Robert Andrews has been involved in finance and real estate since the middle '70's. These are separate endeavors from VAMC." (Pre-Trial Conference Order, at 5.).

conclude that the association-in-fact had a separate existence apart from the pattern on activity in which it engaged.

5. *Participation*

Section 1962(c) prohibits persons employed by or associated with an enterprise from conducting or participating in the conduct of the affairs of that enterprise through a pattern of racketeering activity. To prove participation, plaintiffs had to demonstrate the existence of a relationship between the pattern of racketeering activity and the enterprise. This nexus exists "when 1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or 2) the predicate offenses are related to the activities of the enterprise." *United States v. Sciotto,* 641 F.2d 47, 54 (2nd Cir. 1981); *Dierdorff,* 825 F.2d, at 195 (quoting *Sciotto*).

Defendants located and sold investment opportunities to plaintiffs without disclosing their interests in those investments. Those predicate offenses were related to the activities of the enterprise, which located and sold investments for a number of different clients, including plaintiffs.

6. *Interstate Commerce*

Finally, plaintiffs had to show that the racketeering activity must have some effect on interstate commerce. 18 U.S.C. § 1962(c). Plaintiffs presented evidence to the jury outlining the multistate investments made by plaintiffs with defendants' advice. In their closing argument, plaintiffs observed that

> [i]nterstate commerce just means you use the mails. You use the telephone. We have already been through that. I don't think there is any doubt about that. They certainly did business in more than one state. You heard them say they were in New York and Connecti-

> cut, and they were out here in California, and these businesses are in various other states.

(Transcript, July 29, 1992, at 31-32.) Plaintiff satisfied the interstate commerce element of the RICO offense.

D. *Conclusion*

In light of the jury instructions, the evidence presented by plaintiffs, and the closing argument delivered by their counsel, the Court's decision to grant judgment as a matter of law to defendant VAMC constituted clear error. *ACandS, Inc.,* 5 F.3d at 1263. Because the Court must read the verdict harmoniously with the jury instructions given and draw all possible inferences in favor of the jury's verdict and findings, plaintiff's motion for reconsideration is granted. *Mingus Constructors,* 941 F.2d at 1013; *Donoghue,* 848 F.2d at 932. The portion of the Court's June 29, 1996 Order granting judgment as a matter of law to defendants on plaintiffs' RICO claim is hereby vacated.

III.

JUDGMENT AS A MATTER OF LAW FOR ROBERT AND VINCENT ANDREWS

Defendants' motion for judgment as a matter of law as to Robert and Vincent Andrews was predicated on the dismissal of VAMC as a defendant. The Court has reconsidered that dismissal and finds that plaintiffs did present evidence of an association-in-fact RICO enterprise composed of the Andrews brothers and VAMC.

"Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is." *Garrison v. U.S.,* 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The standard for granting a directed verdict under Rule 50(a) mirrors the standard for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Robert and Vincent Andrews are liable under the RICO statute if they were associated with "any enterprises" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). The jury found, after considering the evidence, that the Andrews brothers were associated in fact with VAMC and that that enterprise engaged in racketeering activity. Substantial evidence supported that finding. Defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews. Defendants had financial interests in many of the partnerships at the time they were recommended to plaintiffs.

Defendant's motion for judgement as a matter of law is denied.

IV

MOTION FOR A NEW TRIAL FOR ROBERT AND VINCENT ANDREWS

Because defendants' motion for a new trial was also predicated on the dismissal of VAMC as a defendant, it is also denied. "Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The jury concluded that a RICO enterprise composed of the three defendants existed as an association-in-fact. That verdict was not contrary to the clear weight of the evidence and did not constitute a miscarriage of justice.

V.

ELECTION OF REMEDIES

Defendants argue that plaintiffs' election of RICO remedies before the resolution of the post-trial issues ought to be considered binding upon them now. However, "it ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies...." *Warren Company v. Neel,* 184 F. Supp. 203, 212 (W.D. Ark. 1968).[4] This is particularly so in the context of RICO, because RICO remedies are cumulative and supplemental to common law remedies. *Arabian American Oil Co. v. Scarfone,* 939 F.2d 1472, 1478 (11th Cir. 1991)

Plaintiffs' election of RICO remedies is not binding. They may within fifteen (15) days make a new election of remedies in light of this Order if they desire.

Date: Aug 13, 1997 /s/ WM. MATTHEW BYRNE, JR.
Wm. Matthew Byrne, Jr.
United States District Judge

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[4] Cases holding parties to binding elections of remedies are rare. In California, "the doctrine of election of remedies ... has been repeatedly criticized and seems to be falling into disfavor. Late California decisions illustrating binding election are comparatively rare...." 3 Witkin, *California Procedure* § 132, p.160.